IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING: DEFENSE AND**
v.	)	**GOVERNMENT MOTIONS FOR**
	)	**INSTRUCTIONS ON LESSER**
MANNING, Bradley E., PFC	)	**INCLUDED OFFENSES**
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company,	)	
U.S. Army Garrison, Joint Base Myer-	)	DATED: 8 June 2012
Henderson Hall, Fort Myer, VA 22211	)	

Defense and Government move the Court for instructions on lesser included offenses (LIO). Each party opposes the other's motion, at least in part. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings:

1. The accused is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934.

2. Specifically, in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, the accused is charged with authorized possession and disclosure of information relating to the national defense in violation of 18 U.S.C. Section 793(e). In specifications 13 and 14 of Charge II, the accused is charged with knowingly exceeding unauthorized access to a government computer in violation of 18 U.S.C. Section 1030(A)(1). Specification 1 of Charge II charges PFC Manning with wrongfully and wantonly causing United States intelligence to be published on the internet, having knowledge that the intelligence placed on the internet is accessible to the enemy, in violation of Article 134. Finally, Specifications 4, 6, 8, 12, and 16 of Charge II allege that the accused stole, purloined, or knowingly converted to his use or the use of another a thing of value owned by the United States government, with a value over $1,000 in violation of 18 U.S.C. Section 641. In addition, each of these specifications allege that the conduct described therein is prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces, in violation of Article 134.

3. At the relevant time, Army Regulation 380-5 (Department of the Army Information Security Program) was in effect. The regulation is a punitive lawful general order per paragraph 1-21.

4. As charged, the elements of Specification 1 of Charge II are (1) that the accused wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States

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government, having knowledge that intelligence published on the internet is available to the enemy and (2) was of a nature to bring discredit upon the armed forces.

5. As charged, the elements of Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, which alleges a violation of 18 U.S.C. § 793(e), are (1) that the accused had unauthorized possession of certain specified information; (2) that the specified information related to the national defense; (3) that the accused had reason to believe the information in question could be used to the injury of the United States or to the advantage of any foreign nation; (4) that the accused willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, the information to any person not entitled to receive it; and (5) that such conduct was prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

6. As charged, the elements of Specifications 13 and 14, of Charge II, which alleges a violation of 18 U.S.C. § 1030(a)(1) are (1) that the accused knowingly accessed a computer exceeding authorized access; (2) by means of such conduct having obtained information determined by the United States government by Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations; (3) that the accused had reason to believe the information obtained could be used to the injury of the United States or to the advantage of any foreign nation; (4) that the accused willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, the information to any person not entitled to receive the information; and (5) that such conduct was prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

7. As charged, the elements of Specifications 4,6,8,12, and 16 of Charge II, which alleges a violation of 18 U.S.C. § 641 are (1) that the records described in the specification belonged to the United States government; (2) that the records had a value in excess of $1,000.00 at the time alleged; (3) that the accused did steal, purloin, or knowingly convert such records to his use or the use of another; (4) that the accused did so knowing the property was not his and with intent to deprive the government of its use or benefit either temporarily or permanently; and (5) that such conduct was prejudicial to good order and discipline in the armed forces and of a nature to discredit upon the armed forces.

8. The elements of a violation of Article 92(1), UCMJ, are (1) that a certain lawful general order or regulation was in effect, (2) that the accused had a duty to obey that order or regulation, and (3) that the accused failed to obey the order or regulation.

9. Defense requests all LIOs that defense agrees are LIO.

LIOs Parties Agree Upon:

1. **Specifications 2-16 of Charge II: Attempt:** The parties agree that attempt can be a lesser included offense of all of the offenses if raised by the evidence.

2. **Specifications 4,6,8,12, and 16 of Charge II: 18 U.S. C. 641 property of a value less than $1,000.00:** The parties agree that this is an LIO.

3. **Specifications 13 and 14 of Charge II: 18 U.S.C. 1030(a)(1): Clause 1 and 2 of Article 134, UCMJ:** The parties agree that this is an LIO.

LIOs in Dispute:

1. **Specifications 2,3,5,7,9,11, and 15 of Charge II: 18 U.S.C. 793(e): Article 92(1), UCMJ -Violation of Army Regulation (AR) 380-5:** Defense requests. Government opposes on the ground that the elements of Article 92(1), UCMJ are not a subset of 18 U.S.C. 793(e).

2. **Specifications 2,3,5,7,9,11, and 15 of Charge II: 18 U.S.C. 793(e): Clauses 1 and 2 of Article 134, UCMJ:** Government requests. Defense opposes on the ground that the clause 1 and 2 violation must be charged as a violation of a lawful general order.

3. **Specification 1 of Charge II: Article 134, clauses 1 and 2: Article 92(1), UCMJ - Violation of Army Regulation (AR) 380-5:** Defense requests. Government opposes on the ground that the elements of Article 92(1), UCMJ are not subset of the elements of Article 134.

4. **Specifications 4,6,8,12, and 16: 18 U.S.C. 641: Clauses 1 and 2 of Article 134, UCMJ:** Government requests. Defense opposes based on preemption by Article 121, UCMJ.

The Law:

1. The proper test for determining whether one offense constitutes a lesser included offense of another is the "elements test" from *Schmuck v. United States*, 489 U.S. 705, 716-17 (1989). *United States v. Jones*, 68 M.J. 465, 469-70 (C.A.A.F. 2010). Under the elements test, "one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given . . . ." *Jones*, 68 M.J. at 469-70 (quoting *Schmuck*, 489 U.S. at 716) (internal quotation marks omitted). The Court must look to Congressional enactments to ascertain the elements of an offense. *Id.* at 471.

2. "[T]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, after applying the normal principles of statutory construction, [the Court] asks whether the elements of the alleged [lesser included offense] are a subset of the elements for the charged offense." *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011) (citation and internal quotation marks omitted). "The fact that there may be an alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense." *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). The charged language in the Specifications determines which statutory variables are relevant for purposes of a lesser included offense analysis. *Id.* at 55. "The comparison is drawn between offenses. Since offenses are statutorily defined, that comparison is appropriately conducted by reference to the statutory elements of the offenses in question and not, as the inherent relationship approach would mandate, by reference to conduct proved at trial regardless of the statutory elements of the offenses in question…One element of an offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *U.S. v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

3. Regarding Article 134, UCMJ, the Manual for Courts-Martial, United States (2012) (M.C.M.) directs that the elements of an assimilated crime or offense not capital are the elements as defined in the applicable law. M.C.M., pt. iv, para. 60(b). If the conduct in question is to be punished under clauses 1 or 2 of Article 134, UCMJ, the elements are twofold: (1) the specific actions the accused did or failed to do, and (2) that the accused's actions or omissions were prejudicial to good order and discipline or of a nature to discredit the armed forces. M.C.M., pt. iv, para. 60(b). Clauses 1, 2, and 3 are alternative theories of prosecution under Article 134. Clauses 1 and 2 are lesser included offenses of clause 3 if the elements of clauses 1 and 2 are plead in the specification. *U.S. v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

Analysis:

Specifications 2,3,5,7,9,11, and 15 of Charge II: 18 U.S.C. 793(e): Article 92(1), UCMJ - Violation of Army Regulation (AR) 380-5:

1. The crime or offense not capital that the Government assimilated via clause three of Article 134, UCMJ in Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II, 18 U.S.C. § 793(e), is a generally applicable, federal criminal statute that is part of the criminal sanctions Congress crafted for espionage. As such, it is not founded upon the existence of a regulation of any of the military services, and Congress did not include a reference to any such authority in establishing the offense found at 18 U.S.C. § 793(e). It is enough that the accused's possession of the specified information was "unauthorized;" the statute does not require more.

2. While a lawful general regulation, such as the one at issue in this case, can serve as the basis for an accused's possession of certain information being unauthorized, the plain language of the statute does not require the existence of any such regulation in order to commit the offense. It is simply irrelevant under the statute what the source of the accused's lack of authority for possessing the information was so long as the accused was, in fact, without that authority. Therefore, it follows that the existence of a lawful general regulation is not necessarily included in a violation of 18 U.S.C. § 793(e). *See Jones*, 68 M.J. at 471.

3. The fact that the regulation in this case can serve as a basis for the lack of authority required in § 793(e) does not alter the analysis. The Specifications in question do not add anything to the statute that would import a requirement for a lawful general regulation into the offense; indeed, they are not permitted to do so for purposes of defining an offense. M.C.M., pt. iv, para. 60(b); *see Jones*, 68 M.J. at 471. The statute also does not include a variable that the Specifications could further refine consistent with *Arriaga*. Instead, § 793(e) specifies the exact conduct required to constitute an offense, and that conduct does not include a failure to obey a lawful general regulation, even though violating a germane lawful general regulation would potentially result in the commission of an offense under § 793(e). To hold otherwise would be to return to the inherent relationship test that the CAAF rejected in *Jones*. The second element of the proposed LIO, Article 92(1) the accused had a duty to obey the lawful general regulation is not a lesser included element of clauses 1 and 2 of Article 134. Prejudice to good order and discipline and service discrediting conduct does not require that the accused had a duty to obey a lawful general regulation. Based on the elements as charged, it is not impossible to prove 18 U.S.C. 793(e) without also proving a violation of a lawful general order. The Defense's request

for an instruction to the effect that a violation of Article 92, UCMJ, is a lesser included offense of the offenses in Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II is denied.

Specification 1 of Charge II: Clause 1 and 2 of Charge II: Clauses 1 and 2 of Article 134, UCMJ:

Similarly, an Article 92 offense is not a lesser included offense of the Article 134 offense described in Specification 1 of Charge II. The actions alleged in Specification 1 of Charge II do not include a failure to obey a lawful general regulation, and that description defines the scope of the elements for that offense. M.C.M., pt. iv, para. 60(b). While the actions alleged, wrongfully and wantonly publishing government intelligence on the internet, could result in a violation of a lawful general regulation, they do not necessarily include such a violation, and a violation of a lawful general regulation alone would not necessarily constitute an offense as described in Specification 1 of Charge II. *See Jones*, 68 M.J. at 471; *cf. Bonner*, 70 M.J. at 3 (finding that assault consummated by a battery is a lesser included offense of wrongful sexual contact because both offenses require offensive contact). The second element of the proposed LIO, Article 92(1) the accused had a duty to obey the lawful general regulation is not a lesser included element of clauses 1 and 2 of Article 134. Prejudice to good order and discipline and service discrediting conduct does not require that the accused had a duty to obey a lawful general regulation. Based on the elements as charged, it is not impossible to prove a clause 1 and 2 violation of Article 134 without also proving a violation of a lawful general order. The Defense's request for a lesser included offense instruction for Specification 1 of Charge II is denied.

Specifications 2,3,5,7,9,11, and 15 of Charge II: 18 U.S.C. 793(e): Clauses 1 and 2 of Article 134, UCMJ:

1. Under *Medina,* the Court finds that violations of clauses 1 and 2 of Article 134 are lesser included offenses of clause 3 of Article 134 because the clause 1 and 2 elements are plead in the specifications. The Government bas not presented the Court witb a brief addressing the Defense argument that *U.S. v. Borunda,* 67 M.J. 607 (A.F. Ct. Crim. App. 2009) precludes the clause 1 and 2 LIO, thus the Court declines to instruct on the LIO. The Government may request reconsideration upon in a written filing addressing the issuc.

Specifications 2,3,5,7,9,11, and 15 of Charge II: 18 U.S.C. 793(e): Clauses 1 and 2 of Article 134, UCMJ:

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Specifications 2,3,5,7, 9,10,11, and 15: 18 U.S.C. 641: Clauses 1 and 2 of Article 134, UCMJ:

Under *Medina*, the Court finds that violations of clauses 1 and 2 of Article 134 are lesser included offenses of clause 3 of Article 134 because the clause 1 and 2 elements are plead in the specifications. The Government has not presented the Court with a brief addressing the Defense argument that Article 121 preempts the clause 1 and 2 LIO, thus the Court declines to instruct on the LIO. The Government may request reconsideration upon in a written filing addressing the issue.

RULING: The Motions for LIO instructions by the parties is **GRANTED IN PART** and **DENIED IN PART.**

1. The Court will instruct on attempt as an LIO if raised by the evidence for specifications 2-16 of Charge II:

2. The Court will instruct on property of a value less than $1,000.00 for specifications 4,6,8,12, and 16 of Charge II.

3. The Court will instruct on clauses 1 and 2, Article 134 as an LIO of specifications 13 and 14 of Charge II.

4. The Court will not instruct on the remaining requested LIOs.

So **ORDERED**: this 8th day of June 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit